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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-880

BRENDA BRUSH,
Petitioner,

vs.

SAN FRANCISCO NEWSPAPER PRINTING COMPANY,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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This brief is filed on behalf of respondent San Francisco Newspaper Printing Company, Inc. in opposition to the petition of Brenda Brush for a writ of certiorari to review the judgment and opinion entered in this proceeding on September 19, 1972 by the United States Court of Appeals for the Ninth Circuit.

QUESTION PRESENTED

Whether respondent is embraced within the definition of "employment agency" in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(c)) by reason of its printing and distribution of classified employment advertising.

STATEMENT OF THE CASE

Petitioner filed this action under the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e *et seq.*). The complaint describes her as a member of the employment market in the San Francisco Bay Area (R. 1). Respondent prints and distributes daily and Sunday editions of the San Francisco Chronicle, San Francisco Examiner and San Francisco Sunday Examiner & Chronicle (R. 46).

The suit involves respondent's dissemination of Help Wanted and Jobs Wanted advertising in the classified want-ad sections of those newspapers. Specifically, the complaint charged (R. 3) that respondent violated section 703(b) of the Act (42 U.S.C.A. § 2000e-2(b)) when it listed such employment advertising under "men" or "women" headings. That section makes it unlawful for an employment agency "to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his . . . sex, . . . or to classify or refer for employment any individual on the basis of his . . . sex . . .". Section 703(e) of the Act (42 U.S.C.A. § 2000e-2(e)) sets forth a general exemption for those instances in which sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business.

Central to petitioner's position in this case is her contention that respondent, because of its printing and distribution of classified employment advertising, falls within Title VII's definition of an employment agency. Section 701(c) of the Act (42 U.S.C.A. § 2000e(c)), defines "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer . . .".

The complaint was directed to both Help Wanted and Jobs Wanted advertising. In connection with the Jobs

Wanted aspect, petitioner sought an order requiring respondent to provide a neutral listing without "men" or "women" headings. That matter was resolved by stipulation in the district court when respondent voluntarily agreed that it would henceforth make available to Jobs Wanted advertisers requesting it a column containing no male or female references. (R.155).[1]

On the Help Wanted aspect, it was stipulated between the parties (R. 46-47) that advertisements appeared in the newspapers not only under "Help Wanted, Men" and "Help Wanted, Women" headings, but also under a third and neutral "[Help] Wanted, Men, Women" heading; that the decision to place a Help Wanted advertisement under one or another of the available headings was the advertiser's and not respondent's; and that respondent did not attempt to determine, from the advertiser or otherwise, whether the sex under which heading an advertisement was to be placed was a bona fide occupational qualification for the position advertised, nor did it attempt to determine whether the advertisement should, in accordance with applicable law, have appeared under some other available listing than that designated by the advertiser. On this phase of the case, the complaint sought an order enjoining respondent from listing available jobs under "men" and "women" headings unless the designated sex was a bona fide occupational qualification for the position listed.[2]

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1. By so stipulating, however, respondent did not abandon its position that the employment agency provisions of Title VII have no application to its classified employment advertising activities.

2. In April 1972, after the briefs had been filed in the Ninth Circuit and the case was awaiting oral argument, respondent voluntarily revised its employment advertising classifications. It no longer utilizes separate "Help Wanted, Men" and "Help Wanted, Women" columns. It now utilizes a unified "Help Wanted" classification under which available positions are listed alphabetically.

On petitioner's motion for preliminary injunction, the district court held that respondent was not an "employment agency" within the meaning of Title VII, denied the application for an injunction, and dismissed the suit. The Ninth Circuit Court of Appeals affirmed in a unanimous *per curiam* opinion.

REASONS FOR DENYING THE WRIT

I. The Decisions Below Are Fully Consistent with the Terms and Objectives of Title VII.

According to petitioner, the decisions of the district court and the Ninth Circuit open a gap in the otherwise comprehensive anti-discrimination legislation embodied in Title VII. It is true that, under those decisions, respondent is not covered as an employment agency by reason of its classified employment advertising activities. It is also true that, under those decisions, respondent may (though it no longer does) separate such advertising under "men" and "women" headings. If those circumstances be considered a "gap" in Title VII, it is one which Congress itself deliberately left open and which the decisions below simply recognized. What is not true is that the decisions jeopardize the effective enforcement of the Act or create a loophole through which persons subject to its provisions can escape the obligations which Congress imposed in passing the 1964 statute.

Despite petitioner's protestations of the sweeping scope of Title VII, it is a statute of limited application. It reaches only the activities of "employers", "employment agencies" and "labor organizations" as defined in Section 701 of the

Act (42 U.S.C.A. § 2000e).[3] The decisions of the court below are not, as petitioner appears to suggest, a creation by the judiciary of an exemption in favor of respondent, by reason of its newspaper status, where Congress had provided for coverage. Rather, they hold only as a matter of statutory construction that Congress did not mean "newspaper" when it said "employment agency". They do not hold that Congress *cannot* or *should not* impose certain responsibilities on respondent in connection with its dissemination of employment advertising, but merely that Congress in enacting Title VII *did not* impose such responsibilities. (R. 157).[4]

That result is not inconsistent with either the terms or objectives of Title VII. It does no more than leave responsibility for nondiscrimination in employment where Congress squarely placed it, namely upon covered employers and employment agencies whose function is job recruitment. Some employers, to be sure, are not covered by the legislation,[5] but that lack of coverage, just as the refusal to

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3. Contrast, *e.g.*, the provisions in section 704(b) of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-3(b)), which prohibit discriminatory employment advertising only on the part of an employer, employment agency or labor organization, with the provisions of section 804(c) of Title VIII of the Civil Rights Act of 1968 (42 U.S.C.A. § 3604(c)), which prohibit discriminatory real estate advertising without any similar limitation. Newspapers have been held subject to the latter prohibition in *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied* ..... U.S. ..... (Oct. 16, 1972).

4. Thus, this case is dissimilar to *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, No. 72-419, in which this Court granted certiorari on December 4, 1972. Petitioner in that case did raise various First Amendment objections upon the basis of its newspaper status to an ordinance of the City of Pittsburgh which it was held to have violated by maintaining a classification system of employment advertisements containing designations as to sex.

5. Under section 701(b) of the Act (42 U.S.C.A. § 2000e(b)), as amended in 1972, only employers with 15 or more employees are subject to the provisions of Title VII.

cover newspapers, is a matter of legislative discretion. On the other hand, despite the noncoverage of newspapers, it is clear that covered employers will be answerable for discriminatory advertising, and that job applicants aggrieved by such advertising have an effective remedy against discriminatory employers. This was demonstrated as recently as last year, in *Hailes v. United Air Lines,* 464 F.2d 1006 (5th Cir. 1972), where the court held that a claim under Title VII was stated for the placement by defendant of an advertisement for a stewardess position under a classified Help Wanted, Women column without any corresponding listing under Help Wanted, Men.

Specifically to strengthen enforcement procedures under Title VII, and in certain respects to expand its coverage, Congress extensively amended the statute in 1972. Among other changes, the amendment extended coverage to employers and labor organizations with fifteen or more employees or members, reducing the former requirement of twenty-five. Existing exemptions in favor of state and local governments were deleted, and consistent with that deletion the definition of "employment agency" with which this suit is concerned was amended to include agencies of states and political subdivisions of states. Perhaps most significantly in terms of achieving compliance with the statute, the Equal Employment Opportunity Commission was given the power to go to court to prevent unlawful employment practices.

The 1972 amendments, particularly geared to broaden coverage and bolster the enforcement features of Title VII, exhibit a vigorous and continuing concern on Congress' part to eliminate the effects of employment discrimination. In light of that concern one would have expected a legislative reaction if Congress had discerned any threat to its objec-

tives from the decisions (of which it is presumably aware[6]) that newspapers do not fall within the Act by reason of their publication of employment advertising. However, such a reaction was not forthcoming, although it could easily have been expressed by including explicit reference to newspapers in their capacity of employment advertising publishers as part of the amendment to the "employment agency" definition. The inference is that Congress does not view those decisions as inconsistent with Title VII's terms or objectives.

Finally, the decisions below have not paved the way for knowing participation by respondent in the process of unlawful discrimination by employers. Petitioner's argument on that score is a considerable overstatement, proceeding on the assumption of a conscious awareness by respondent of several factors, including (1) that an employer listing in one or another of the "men" or "women" columns would have been unwilling to consider an applicant of the other sex, (2) that the particular advertiser fell within Title VII's definition of "employer", (3) that none of Title VII's exemptions applied, and (4) that there were no circumstances peculiar to the advertiser's business or to the position listed which might justify a claim of a bona fide occupational qualification.

Not only does the record fail to support such an assumption, but it indicates quite the contrary, for respondent did not undertake to determine from each of its advertisers whether or not they were properly placing advertisements in a sex-designated column. The responsibility for making such a determination, without which there is no knowing

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6. In addition to this case, *Greenfield v. Field Enterprises, Inc.*, ... F.Supp. ....., 4 F.E.P. Cases 548 (N.D. Ill. 1972), has held that Title VII's definition of "employment agency" does not include a newspaper in its capacity as a publisher of employment advertising.

participation by respondent in an employer's discrimination, was (as the legislative history reviewed below demonstrates) precisely what Congress intended not to impose upon newspapers in passing the legislation.

Thus, the district court and Ninth Circuit decisions are not at odds with the policy and goals to which the Civil Rights Act of 1964 is directed. They pose no threat either to the administration or to the enforcement of its provisions, and the petition for certiorari should therefore be denied.

II. The Holdings of the District Court and the Ninth Circuit Are Correct.

The petition should also be denied because the decisions of the courts below that respondent is not a covered employment agency are for several reasons correct. First, their construction of the statutory definition is fully consistent with the ordinary understanding of the term "employment agency". Petitioner correctly points out that where, as here, a statute contains its own definition, that definition must control no matter how the term is generally understood. But where, again as here, the statutory definition parallels exactly the ordinary understanding of the term,[7] the inference is that Congress had that understanding in mind when drafting its definition.

Second, to argue as petitioner does that a literal reading of the definitional section requires application of Title VII to newspapers is to ignore the functional differences between an employment agency and the classified want-ad. This is so because the printing and distribution of want-

7. Compare the statutory definition with Webster's Third International Dictionary, which defines "employment agency" as "an agency whose business is to find jobs for those seeking them or people to fill jobs that are open."

ads is simply not an undertaking by defendant to procure employees or employment opportunities, the function which brings a person within the coverage of the Act's employment agency provisions. The entire function of an employment agency is to act on behalf of employers or employees to find or fill available positions. It is a middleman, handling job orders and developing and directing response to employment situations. (Cf., Equal employment Opportunity Commission Guidelines on Discrimination Because of Sex. 29 C.F.R. § 1604.5). In contrast, respondent merely prints and circulates advertising. In doing so, it does not undertake to locate or fill job openings for the advertiser, nor is it the advertiser's agent for those purposes. Its only undertaking is to provide the advertiser with space, much like a bulletin board, as the means of attracting his own response to an employment situation. As succinctly stated by the district court (R. 158):

> "Newspapers, although in the business of printing and publishing advertising copy presented by employers, professional employment agencies and job seekers, are not in any other or ordinary sense engaged in the business of procuring employees or employment opportunities--any more than they are engaged in the used car business or in the real estate business when they accept and print advertising copy designed to bring buyers and sellers together in those fields."

Third, the decisions below are not premised upon a concern for the burden which would ensue to respondent if it were held to be included within Title VII. Unquestionably, a considerable burden would be placed upon respondent if petitioner's arguments were accepted. A holding that respondent is an "employment agency" within the Act would require it, at the expense of considerable cost and disruption (R. 144-145), to have policed each of its hundreds of Help Wanted, Men and Help Wanted, Women advertise-

ments on a daily basis to determine whether they were in compliance with the law. Before placing an ad in the column of the advertiser's choice, respondent would be obliged to determine whether the advertiser was an employer covered by Title VII, whether the designated sex was a bona fide occupational qualification, and whether any of Title VII's exemptions might apply.

The district court recognized that such a responsibility would result from a holding in petitioner's favor. However, its decision was not based upon any sense of leniency toward respondent, but upon a recognition from the legislative history that Congress never meant such a responsibility to befall respondent under Title VII. That legislative history is contained in a Report of the House Committee on the Judiciary (H.R. Rep. No. 914, 88th Cong., 1st Sess., 2 U.S. Code Congr. and Admin. News 2403 (1964)) and in an Interpretive Memorandum by Senators Clark and Case (110 Congr. Rec. 7213 (1964)). Both excerpts relate to the reach of section 704(b) of the Act (42 U.S.C.A. § 2000e-3(b)), which makes it an unlawful employment practice "to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification or discrimination, based on race, color, religion, sex, or national origin".

The House Report states as follows with respect to that section:

> "The prohibitions of this section do not require newspapers and other publications to exercise any control or supervision over, or to do any screening of, the advertisements and notices published by them."

The Interpretive Memorandum of Senators Clark and Case states:

> "Section [704(b)] prohibits discriminatory advertising by employers, employment agencies and labor organizations. . . . It should be noted that the prohibition does not extend to the newspaper or other publication printing the advertisement. It runs solely to the sponsoring firm or organization."

Both those excerpts indicate clearly that the results which would follow from acceptance of petitioner's position were not within contemplation of Congress in enacting the legislation. Petitioner's quarrel with the legislative history is that it deals with a section of the Act other than the definitional section upon which she relies. However, where Congress has so clearly said that it did not intend the results which would, in accordance with petitioner's arguments, follow from inclusion of respondent within the definition of "employment agency", it is equally clear that it did not intend the definition to cover them. In addition, petitioner attempts to sidestep that history by arguing that it is fragmentary in nature. However, the brevity of attention given by the history to the very question involved in this suit is no reason to ignore it.

It may be true, as urged by petitioner (petition for certiorari, p. 9) that newspapers, if subject to the provisions of Title VII, "could be powerful agents for securing compliance [with the statute] as a matter of routine". In fact, the whole point of her suit is apparently to establish the principle that newspapers are bound to police advertisements designated for "men" or "women" columns and thereby to undertake functions of an enforcement agency. Respondent, however, has neither the resources nor the expertise required of such a function, a fact which is recognized not only in the district court decision (*e.g.*, R. 160), but also by Congress as reflected in the passages from the legislative history reviewed above. In short, enforcement

of the legislation has been placed by Congress (suits by private parties aside) with the Equal Employment Opportunity Commission and the office of the Attorney General of the United States. The decisions of the courts below are entirely consistent with that placement of enforcement responsibility and are therefore correct.

CONCLUSION

Citing *Culpepper v. Reynolds Metals Company*, 421 F.2d 888, 891 (5th Cir. 1970), petitioner invokes the notion that "it is . . . the duty of the courts to make sure that the Act works". However, if Congress has omitted to provide in Title VII for coverage of respondent, the courts cannot supply that omission on the basis of some broadly conceived objective. It is no more the duty of the courts to make the Act work by supplying what Congress has left out than it is the duty of the courts to draft legislation in the first place.

The matter was well put by Judge Coleman in his concurring opinion in *Culpepper*, where he states (421 F.2d at 895):

> "[I]t is never the duty or the concern of courts 'to make sure the Act works'. Under our Constitutionally ordained form of government, whether an Act works or fails is the concern of the Executive or of the Legislature, or both—not the courts. I . . . agree to the interpretations herein given because I think they are legally correct, not because there is any judicial duty to rescue an Act of Congress from some lack of utility which Congress, if it so desires, has the clear power to correct."

The correct principles have been applied by this Court on more than one occasion when it has been asked to enlarge upon legislation in view of some objective attributed

to Congress. As Mr. Justice Cardozo speaking for the Court has held, "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." (*Anderson v. Wilson*, 289 U.S. 20, 27 (1933)).

In a similar situation Mr. Justice Brandeis stated: "What the government asks is not a construction of a statute but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. [citing cases]." (*Iselin v. United States*, 270 U.S. 245, 251 (1926)).

The principle was correctly observed and applied by the district court in this case, where Judge Sweigert stated (R. 164) that "If . . . the legislation would be improved by the inclusion of newspapers, such inclusion must be accomplished by Congress—not by the courts". That decision, which has already had the benefit of one appellate review in which the Ninth Circuit substantially agreed with its conclusions, is a sound one. It neither jeopardizes the implementation of the anti-discrimination provisions of Title VII nor is it inconsistent with the national policy therein expressed.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: January 10, 1973.

Respectfully submitted,

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